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**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
c/o [REDACTED]  
[REDACTED]

DECISION

MKB/141653

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 10, 2011, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau in regard to Medical Assistance, a hearing was held on October 25, 2012, at Waukesha, Wisconsin.

The issue for determination is whether the Disability Determination Bureau (DDB) correctly denied Petitioner's request for disability-based Medicaid under the Katie-Beckett program.

The record was held open to give Petitioner's mother an opportunity to submit additional documentation from his former treatment providers. A 12-page fax sent on October 30, 2012 has been marked as Exhibit 2 and a 20-page fax sent on October 25, 2012 has been marked as Exhibit 3.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
c/o [REDACTED] and  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703

By: DDB file

Disability Determination Bureau  
722 Williamson St.  
Madison, WI 53703

**ADMINISTRATIVE LAW JUDGE:**

Mayumi M. Ishii  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. Petitioner is a ten-year-old resident of Waukesha County.
2. On March 28, 2011, Petitioner applied for Disability-based Medicaid under the Katie-Beckett program. (Exhibit 1, DDB file)
3. The DDB sent Petitioner a notice on September 28, 2011 denying his application. (Exhibit 1)
4. Petitioner's parents, on his behalf, filed a request for reconsideration on November 10, 2011. (Exhibit 1)
5. The DDB again denied Petitioner's request for Disability-based Medicaid under the Katie-Beckett program and forwarded Petitioner's file to the Division of Hearings and Appeals for review. (Exhibit 1)
6. Petitioner has been diagnosed with Asperger's Syndrome, which is an autism spectrum disorder. (Exhibit 1)
7. DDB determined that Petitioner is not disabled because, although his impairment is "severe," it does not meet, medically equal, or functionally equal the severity of a listed impairment. More specifically, his impairment allegedly does not cause sufficiently marked or extreme functional limitations. (Exhibit 1)
8. Petitioner's condition does not meet the Listing criteria for §112.10 - autistic disorder and pervasive developmental disorders because Petitioner's medical records indicate that he has multiple interests, including Pokemon, Star Wars, video games, playing tag on the playground, watching television, playing on the computer, playing outside, playing the flute and playing piano. Petitioner has also expressed an interest in restarting church attendance and was previously involved in Boy Scouts. (Exhibits 1, 2 and 3)
9. The DDB concluded that Petitioner has
  - a. No limitations in acquiring and using information,
  - b. No limitations in attending and completing tasks,
  - c. Less than marked limitations in interacting in relating with others,
  - d. No limitations in moving about and manipulating objects
  - e. Marked limitations in caring for himself and
  - f. No limitations in his health and physical well-being.

(Exhibit 1)

### **DISCUSSION**

Petitioner desires to be found eligible for disability-based Medicaid under the Katie Beckett Program. As a condition of eligibility, he must be found "disabled," at the level required for federal SSI eligibility.

#### **I. DEFINITION OF CHILDHOOD DISABILITY.**

To be considered a disabled person, an applicant must meet the tests used by the Social Security Administration to determine disability for Supplemental Security Income (SSI) benefits. For SSI purposes, a disabled child must have a medically determinable physical or mental impairment, or combination of impairments, that causes marked and severe functional limitation, and that can be expected to last for at least a year. 20 C.F.R. §416.906. More specifically, 20 C.F.R. §416.911(b) declares:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

- (1) Must meet, medically equal, or functionally equal the requirements of the listings, [appendix 1 of Subpart P of 20 C.F.R., Part 404], or
- (2) Would result in a finding that you are disabled under sec. 416.994a ...

A sequential process is used to apply these definitions to a specific case. 20 C.F.R. §416.924. The first test in the sequence is whether the claimant is performing “substantial gainful activity.” Because Petitioner is not working, he passes this first test.

The second sequential test is whether the claimant has an impairment or combination of impairments that is “severe.” If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it is not severe. 20 C.F.R. §416.924(c). The Disability Determination Bureau (DDB) has conceded that Petitioner’s impairment is severe, so he passes the second test.

The third sequential test element is the heart of the dispute here. The third test considers whether the child has an impairment(s) that *meets, medically equals, OR functionally equals* in severity any impairment that is listed in Appendix 1 of Subpart P of Part 404 of the regulations (Listings). 20 C.F.R. §416.924(d). The DDB determined that Petitioner did not meet this requirement, and that he is therefore not disabled for SSI/MA purposes.

## II. PETITIONER’S CONDITION DOES NOT *MEET OR MEDICALLY EQUAL* THE LISTINGS AT SECTION 12.10.

There is a specific section in the Code of Federal Regulations that describes the symptoms a child must exhibit, in order to be found disabled for the purposes of medical assistance, Appendix 1 of Subpart P of Part 404. These are generally referred to as the Listing criteria. The criteria specific to Asperger’s Syndrome is found in §12.10 Autistic Disorders & Other Pervasive Developmental Disorders.

For Autistic Disorders in children age 3 or older, the listing criteria are met when there are medically documenting findings of:

- a. Qualitative deficits in the development of reciprocal social interactions; and
- b. Qualitative deficits in verbal and non-verbal communication and in imaginative activity; and
- c. Markedly restricted repertoire of activities and interests;

AND

- a. Marked impairment in age-appropriate cognitive/communicative function, documented by medical findings and, if necessary, standardized testing, OR
- b. Marked impairment in age-appropriate social functioning, documented by history and medical findings and, if necessary, standardized testing, OR
- c. Marked impairment in age-appropriate personal functioning, documented by medical findings and, if necessary, standardized testing.

Petitioner does not meet the specific Listing criteria, in part because he does not have a markedly restricted repertoire of activities in interests. Indeed, there is nothing in the record to indicate that Petitioner is obsessed with a single activity or very few activities. On the contrary, Petitioner’s medical records indicate

that he has interests in Pokemon, Star Wars, video games, playing tag on the playground, watching television, playing on the computer, playing outside, playing the flute and playing piano.

The next question is whether he *functionally equals* the listing standard.

### III. PETITIONER'S CONDITION DOES *FUNCTIONALLY EQUAL* THE SECTION 112 LISTINGS.

The Listings describe impairments that are significant enough to cause "marked and severe" functional limitations. This phrase is a term of art in children's disability rules. In general, a child's impairment(s) is of "listing-level severity" if it results in "marked" limitations in two of six broad areas of functioning, or "extreme" limitations in one such area. 20 C.F.R. §416.925.

"Marked" and "extreme" limitation are defined at 20 C.F.R. 416.926a(e). Marked is defined as:

(2) *Marked limitation.* (i) We will find that you have a "marked" limitation in a domain when your impairment(s) interferes seriously with your ability to independently initiate, sustain, or complete activities. Your day-to-day functioning may be seriously limited when your impairment(s) limits only one activity or when the interactive and cumulative effects of your impairment(s) limit several activities. "Marked" limitation also means a limitation that is "more than moderate" but "less than extreme." It is the equivalent of the functioning we would expect to find on standardized testing with scores that are at least two, but less than three, standard deviations below the mean.

20 C.F.R. 416.926a(e)(2)(i).

As suggested in this definition test scores are not always present and the regulations account for that:

(ii) The medical evidence may include formal testing that provides information about your development or functioning in terms of percentiles, percentages of delay, or age or grade equivalents. Standard scores (e.g., percentiles) can be converted to standard deviations. When you have such scores, we will consider them together with the information we have about your functioning to determine whether you have a "marked" or "extreme" limitation in a domain.

20 C.F.R. 416.926a(e)(1)(ii).

The SSI rule identifies six domains to be reviewed: (1) Acquiring and using information, (2) Attending and completing tasks, (3) Interacting and relating with others, (4) Moving about and manipulating objects, (5) Caring for yourself, and (6) Health and physical well-being. 20 C.F.R. §416.926a(b)(1).

The DDB found Petitioner to have limitations in only two areas. It found Petitioner to have marked limitations in his ability to care for himself because he has had difficulty controlling and appropriately expressing his anger, which resulted in head banging, door slamming, and homicidal ideation toward his mother. The latter resulted in Petitioner's hospitalization for five days. The DDB further noted that Petitioner has made improvements in his ability to emphathize and to calm down during conflicts with peers. This is corroborated by the testimony of Petitioner's mother, indicating that the frequency of his outbursts has decreased somewhat because Petitioner has learned techniques to control his anger and because his parents have learned how to better address his behaviors.

The DDB found Petitioner to have less than marked limitations in interacting in relating with others, stating that although Petitioner does have inappropriate, physical outbursts, he is able to adequately express himself verbally and to use listening skills. The DDB further noted that Petitioner has begun to build relationships with children in his class.

Petitioner's parents argue that he has marked limitations in relating with others, noting that he prefers to interact with adults or younger children. Petitioner's mother testified that they could no longer take Petitioner to birthday parties or to boy scouts because it was too difficult for Petitioner. Petitioner's mother further testified that Petitioner continues to be physically abusive towards her, although not as frequently as before, because she has learned to better manage his symptoms and because she has been able to identify and therefore, avoid triggers, such as doing homework.

The federal regulations indicate that the following are some examples of limited function in interacting and relating with others:

- (i) You do not reach out to be picked up and held by your caregiver.
- (ii) You have no close friends, or your friends are all older or younger than you.
- (iii) You avoid or withdraw from people you know, or you are overly anxious or fearful of meeting new people or trying new experiences.
- (iv) You have difficulty playing games or sports with rules.
- (v) You have difficulty communicating with others; e.g., in using verbal and nonverbal skills to express yourself, carrying on a conversation, or in asking others for assistance.
- (vi) You have difficulty speaking intelligibly or with adequate fluency.

*20 CFR 416.926a.*

The progress notes from Petitioner's therapist, which are included in the DDB file, support the DDB's determination that Petitioner does have limitations in his interactions and relating with others, but not a marked limitation. The entry for August 3, 2011 indicated that Petitioner asked engaging questions such as when the therapist knew he wanted to be a psychologist. The entry for December 23, 2011 indicates that Petitioner has major challenges with peers, but that has begun to take steps to build relationships with some of the children in his class and asked for a "play date". The entry for January 23, 2012 indicated that Petitioner did well at his birthday party, co-operated and worked well with others without any incident. His parent reported that he was able to calm himself when he did get upset and that he was able to communicate effectively. Finally, the entry for March 12, 2012, indicates that Petitioner has begun to find better ways to calm down when in conflict with his peers. I also note that Petitioner's IEP from 2010, which is also in the DDB file, indicated that Petitioner frequently joined a group of boys on the playground to play tag.

Based upon the foregoing, it is found that Petitioner, although impaired, is not markedly limited in his interactions and relating with others. Consequently, Petitioner is not markedly limited in two of the six domains discussed above. As such, Petitioner's condition, although a significant challenge for him and his parents, does not functionally equal the section 112 Listing Criteria.

### **CONCLUSIONS OF LAW**

The DDB correctly denied Petitioner's request for disability-based Medicaid through the Katie Beckett program.

**THEREFORE, it is**

**ORDERED**

That the petition is dismissed.

**REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

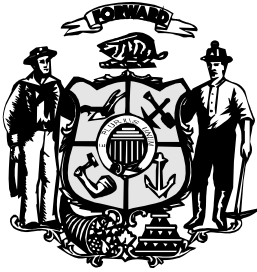
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 13th day of November, 2012.

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Mayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on November 13, 2012.

Waukesha County Health and Human Services  
Bureau of Long-Term Support  
Division of Health Care Access and Accountability